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6  
7 **UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

8 REGAL I, LLC, a Nevada limited liability  
company, f/k/a PEBBLE COMMERCIAL  
9 CENTER, LLC,

Case No.: 2:21-cv-00477-RFB-EJY

**DEFENDANT'S ANSWER**

10 Plaintiff,

11 vs.

12 EASTGATE THEATRE, INC., an  
Oregon corporation; DOES individuals I  
13 through X; and ROE Corporations and  
Organizations I through V, inclusive,

14 Defendants.  
15

16 For its answer to Plaintiff Regal I, LLC's, complaint, Defendant Eastgate Theater,  
17 Inc., by and through its attorney, John E. Bragonje of Lewis Roca Rothgerber Christie  
18 LLP, hereby admits, denies, and alleges as follows:

19 **GENERAL ALLEGATIONS**

20 1. Answering Paragraph 1 of the complaint, Eastgate Theater states that it is  
21 without sufficient knowledge or information upon which to base an answer and on that  
22 basis denies each and every such allegation contained therein.

23 2. Answering Paragraph 2 of the complaint, Eastgate Theater admits the  
24 allegations contained therein.

25 3. Answering Paragraph 3 of the complaint, Eastgate Theater states that it is  
26 without sufficient knowledge or information upon which to base an answer and on that  
27 basis denies each and every such allegation contained therein.

1           4.     Answering Paragraph 4 of the complaint, Eastgate Theater responds  
2 that the allegation calls for a legal conclusion and therefore no answer is required.  
3 To the extent that a response is deemed necessary, Eastgate Theater denies the  
4 claim. Eastgate Theater affirmatively alleges that because the case has been  
5 removed to the United States District Court for the District of Nevada, the Nevada  
6 State statutes on venue are inapplicable.

7           5.     Answering Paragraph 5 of the complaint, Eastgate Theater admits the  
8 allegations contained therein.

9           6.     Answering Paragraph 6 of the complaint, Eastgate Theater admits the  
10 allegations contained therein.

11          7.     Answering Paragraph 7 of the complaint, Eastgate Theater states that the  
12 Lease (Exhibit 1) is a written document that speaks for itself, and therefore no response is  
13 required to the summary of it that Plaintiff offers. To the extent a response is required,  
14 Eastgate Theater denies the allegations.

15          8.     Answering Paragraph 8 of the complaint, Eastgate Theater denies the  
16 allegations contained therein.

17          9.     Answering Paragraph 9 of the complaint, Eastgate Theater responds that the  
18 allegation calls for a legal conclusion and therefore no answer is required. To the extent  
19 that a response is deemed necessary, Eastgate Theater denies the claim.

20          10.    Answering Paragraph 10 of the complaint, Eastgate Theater responds that  
21 the allegation calls for a legal conclusion and therefore no answer is required. To the extent  
22 that a response is deemed necessary, Eastgate Theater denies the claim.

23          11.    Answering Paragraph 11 of the complaint, Eastgate Theater denies the  
24 allegations contained therein.

25          12.    Answering Paragraph 12 of the complaint, Eastgate Theater states that it is  
26 without sufficient knowledge or information upon which to base an answer and on that  
27 basis denies each and every such allegation contained therein.

1           13.     Answering Paragraph 13 of the complaint, Eastgate Theater states that the  
2 Exhibit 2 is a written document that speaks for itself, and therefore no response is required  
3 to the summary of it that Plaintiff offers. To the extent a response is required, Eastgate  
4 Theater denies the allegations.

5           14.     Answering Paragraph 14 of the complaint, Eastgate Theater states that the  
6 Exhibit 3 is a written document that speaks for itself, and therefore no response is required  
7 to the summary of it that Plaintiff offers. To the extent a response is required, Eastgate  
8 Theater denies the allegations.

9           15.     Answering Paragraph 15 of the complaint, Eastgate Theater states that it is  
10 without sufficient knowledge or information upon which to base an answer and on that  
11 basis denies each and every such allegation contained therein. Eastgate Theater further  
12 states that the Exhibit 4 is a written document that speaks for itself, and therefore no  
13 response is required to the summary of it that Plaintiff offers. To the extent a response is  
14 required, Eastgate Theater denies the allegations.

15           16.     Answering Paragraph 16 of the complaint, Eastgate Theater states that the  
16 Exhibit 5 is a written document that speaks for itself, and therefore no response is required  
17 to the summary of it that Plaintiff offers. To the extent a response is required, Eastgate  
18 Theater denies the allegations.

19           17.     Answering Paragraph 17 of the complaint, Eastgate Theater states that the  
20 Exhibit 5 is a written document that speaks for itself, and therefore no response is required  
21 to the summary of it that Plaintiff offers. To the extent a response is required, Eastgate  
22 Theater denies the allegations.

23           18.     Answering Paragraph 18 of the complaint, Eastgate Theater admits that it  
24 filed a pleading. As to the allegation that Eastgate Theater's pleading "requested that the  
25 court compel mediation," Eastgate Theater states that the referenced pleading, which is not  
26 attached to the complaint, is a written document that speaks for itself, and therefore no  
27  
28

1 response is required to the summary of it that Plaintiff offers. To the extent a response is  
2 required, Eastgate Theater denies the allegations.

3 19. Answering Paragraph 19 of the complaint, Eastgate Theater admits the  
4 allegations contained therein.

5 20. Answering Paragraph 20 of the complaint, Eastgate Theater admits that a  
6 summary eviction hearing occurred on December 29, 2020. As to the allegation concerning  
7 the nature and extent of Eastgate Theater's counsel's oral argument, Eastgate Theater states  
8 that the oral argument speaks for itself, and therefore no response is required to the  
9 summary of it that Plaintiff offers. To the extent a response is required, Eastgate Theater  
10 denies the allegations.

11 21. Answering Paragraph 21 of the complaint, Eastgate Theater admits the  
12 allegations contained therein.

13 22. Answering Paragraph 22 of the complaint, Eastgate Theater denies the  
14 allegations contained therein.

15 23. Answering Paragraph 23 of the complaint, Eastgate Theater denies the  
16 allegations contained therein.

17 24. Answering Paragraph 24 of the complaint, Eastgate Theater admits the  
18 allegations contained therein.

19 **FIRST CLAIM FOR RELIEF**

20 **Unlawful Detainer Pursuant to NRS 40.2512**

21 25. Answering Paragraph 25 of the complaint, Eastgate Theater repeats and re-  
22 alleges the responses in the preceding paragraphs of this answer, above, and incorporates  
23 the same herein as if set forth in full.

24 26. Answering Paragraph 26 of the complaint, Eastgate Theater states that the  
25 Lease (Exhibit 1) is a written document that speaks for itself, and therefore no response is  
26 required to the summary of it that Plaintiff offers. To the extent a response is required,  
27 Eastgate Theater denies the allegations.

1           27.     Answering Paragraph 27 of the complaint, Eastgate Theater states that the  
2 Lease (Exhibit 1) is a written document that speaks for itself, and therefore no response is  
3 required to the summary of it that Plaintiff offers. To the extent a response is required,  
4 Eastgate Theater denies the allegations.

5           28.     Answering Paragraph 28 of the complaint, Eastgate Theater states that it is  
6 without sufficient knowledge or information upon which to base an answer and on that  
7 basis denies each and every such allegation contained therein. Eastgate Theater further  
8 states that the Exhibit 4 is a written document that speaks for itself, and therefore no  
9 response is required to the summary of it that Plaintiff offers. To the extent a response is  
10 required, Eastgate Theater denies the allegations. (Paragraph 28 refers to a November 10,  
11 2020 “Seven-Day Notice to Pay Rent or Quit” as Exhibit 5, but Paragraph 15 referred to  
12 this document as Exhibit 4.)

13           29.     Answering Paragraph 29 of the complaint, Eastgate Theater denies the  
14 allegations contained therein.

15           30.     Answering Paragraph 30 of the complaint, Eastgate Theater denies the  
16 allegations contained therein.

17                               **SECOND CLAIM FOR RELIEF**

18                               **Breach of Contract**

19           31.     Answering Paragraph 31 of the complaint, Eastgate Theater repeats and re-  
20 alleges the responses in the preceding paragraphs of this answer, above, and incorporates  
21 the same herein as if set forth in full.

22           32.     Answering Paragraph 32 of the complaint, Eastgate Theater denies the  
23 allegations contained therein.

24           33.     Answering Paragraph 33 of the complaint, Eastgate Theater denies the  
25 allegations contained therein.

26           34.     Answering Paragraph 34 of the complaint, Eastgate Theater denies the  
27 allegations contained therein.

**THIRD CLAIM FOR RELIEF**

**Breach of the Implied Covenant of Good Faith and Fair Dealing (Tortious)**

35. Answering Paragraph 35 of the complaint, Eastgate Theater repeats and re-alleges the responses in the preceding paragraphs of this answer, above, and incorporates the same herein as if set forth in full.

36. Answering Paragraph 36 of the complaint, Eastgate Theater responds that the allegation calls for a legal conclusion and therefore no answer is required. To the extent that a response is deemed necessary, Eastgate Theater denies the claim.

37. Answering Paragraph 37 of the complaint, Eastgate Theater denies the allegations contained therein.

38. Answering Paragraph 38 of the complaint, Eastgate Theater denies the allegations contained therein.

39. Answering Paragraph 39 of the complaint, Eastgate Theater denies the allegations contained therein.

40. Answering Paragraph 40 of the complaint, Eastgate Theater denies the allegations contained therein.

**FOURTH CLAIM FOR RELIEF**

**Injunctive Relief**

41. Answering Paragraph 41 of the complaint, Eastgate Theater repeats and re-alleges the responses in the preceding paragraphs of this answer, above, and incorporates the same herein as if set forth in full.

42. Answering Paragraph 42 of the complaint, Eastgate Theater denies the allegations contained therein.

43. Answering Paragraph 43 of the complaint, Eastgate Theater denies the allegations contained therein.

44. Answering Paragraph 44 of the complaint, Eastgate Theater denies the allegations contained therein.

**FIFTH CLAIM FOR RELIEF****Punitive Damages**

45. Answering Paragraph 45 of the complaint, Eastgate Theater repeats and re-alleges the responses in the preceding paragraphs of this answer, above, and incorporates the same herein as if set forth in full.

46. Answering Paragraph 46 of the complaint, Eastgate Theater denies the allegations contained therein.

47. Answering Paragraph 47 of the complaint, Eastgate Theater denies the allegations contained therein.

48. Answering Paragraph 48 of the complaint, Eastgate Theater denies the allegations contained therein.

49. Eastgate Theater denies all allegations not expressly admitted

**AFFIRMATIVE DEFENSES****FIRST AFFIRMATIVE DEFENSE**

Plaintiff Pebble Commercial Center, LLC/Regal I, LLC (“Landlord”) is seeking rent that is far in excess of the amount due and owing. The Ground Lease, executed November 5, 1997 (“Lease”) contains *aforce majeure* clause, which “excuse[s] performance of such obligations of Lessor or Tenant as are rendered impossible or reasonably impracticable to perform while such event continues.” (Lease ¶ 22.7.) The “event[s]” include “acts of God . . . governmental restrictions, regulations or controls; judicial orders; ... and other causes beyond the reasonable control of the party obligated to perform.” (*Id.*) Since at least March 2020, the COVID-19 pandemic has crippled much of the world’s economy, including that of Nevada. As a result of federal recommendations and Nevada executive orders, movie theatres across the state have been largely forced to remain closed. Eastgate Theatre closed its doors for these reasons on March 16, 2020. It remained closed until a subsequent executive order permitted limited operation of movie theatres on August 21, 2020. Even then, theatres were only allowed to operate at 50 percent

1 capacity, with no more than 50 people per theatre. However, continuing public  
 2 apprehension of the virus led to ticket sales far below those limitations. On October 8,  
 3 2020, Eastgate Theatre again was compelled to close its doors, this time because the supply  
 4 of movies had been severely limited. Because of greatly reduced demand caused by the  
 5 pandemic and the resultant government restrictions, movie studios moved numerous movie  
 6 release dates to 2021, or left release dates undisclosed, and only released a limited number  
 7 of new movies to theatres for exhibition. Eastgate Theatre was thus left with limited new  
 8 releases to show while still subject to government-mandated capacity restrictions  
 9 compound Eastgate Theatre's financial hardship. The COVID-19 pandemic is subject to  
 10 the *force majeure* clause because (1) it is an "act[] of God," (2) it led to "governmental  
 11 restrictions, regulations or controls; [and] judicial orders," and (3) "it was beyond the  
 12 reasonable control of the party obligated to perform."

### 13 SECOND AFFIRMATIVE DEFENSE

14 The COVID-19 pandemic rendered "performance" of the Lease "impossible or  
 15 highly impractical by the occurrence of unforeseen contingencies." *Nebaco, Inc. v.*  
 16 *Riverview Realty Co.*, 87 Nev. 55, 57, 482 P.2d 305, 307 (1971); *see also* *Helms Constr. &*  
 17 *Dev. Co. v. State*, 97 Nev. 500, 634 P.2d 1224 (1981).

### 18 THIRD AFFIRMATIVE DEFENSE

19 Nevada law excuses certain contractual obligations when "after a contract is made,  
 20 a party's principal purpose is substantially frustrated . . . by the occurrence of an event, the  
 21 non-occurrence of which was a basic assumption on which the contract was made." *Towbin*  
 22 *v. Empire Suzuki*, No. 2:08-cv-01719, 2009 WL 10693409, at \*2 (D. Nev. Aug. 5, 2009)  
 23 (quoting RESTATEMENT (SECOND) OF CONTRACT § 265). The COVID-19 pandemic  
 24 substantially frustrated the performance of the Lease.



FOURTH AFFIRMATIVE DEFENSE

The notices sent by Landlord, if any, pursuant to “Summary Proceedings for Obtaining Possession of Real Property, Recreational Vehicle or Mobile Home,” NRS 40.215 *et seq.*, were not proper or effective because of the COVID-19 pandemic.

FIFTH AFFIRMATIVE DEFENSE

Landlord’s breach of the implied covenant claim suffers from a fatal defect: it is redundant. It fails as insufficient because the allegations are based on the same conduct that is alleged to be the basis for establishing a separately asserted breach of contract claim. “It is well established that a claim alleging breach of the implied covenants of good faith and fair dealing cannot be based on the same conduct establishing a separately pled breach of contract claim.” *Shaw v. CitiMortgage, Inc.*, 201 F. Supp. 3d 1222, 1252 (D. Nev. 2016) (collecting cases); *see also Stebbins v. Geico Ins. Agency*, No. 2:18-cv-00590-APG-GWF, 2019 WL 281281, at \*2 (D. Nev. Jan. 22, 2019); *Rosas v. GEICO Cs. Co.*, 365 F. Supp. 3d 1123, at \*4 (D. Nev. 2019).

SIXTH AFFIRMATIVE DEFENSE

Landlord’s claims for punitive or exemplary damages cannot be sustained because an award of punitive damages under Nevada law is subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount that a jury may impose, which would violate Eastgate Theater’s due process rights guaranteed by the 14th Amendment to the United States Constitution (U.S. Const. Amends. XIV) and by the due process provisions of the Nevada Constitution.

SEVENTH AFFIRMATIVE DEFENSE

Landlord’s claims for punitive damages are barred because the acts and omissions of Eastgate Theatre, if any, fail to rise to the level required to sustain an award of punitive damages; there was no evil intent, no evidence of malicious, knowing, oppressive or fraudulent intent to deny Landlord its protected rights, if any, and no wantonness or willfulness, and thus no support for an award of punitive damages.

1 EIGHTH AFFIRMATIVE DEFENSE

2 Alternatively, Eastgate Theater invokes all rights and remedies to which it is or may  
3 be entitled pursuant to Nevada law and federal procedural rules and laws, including, but not  
4 limited to, Landlord's burden of proving its entitlement to punitive damages by clear and  
5 convincing evidence and Eastgate Theater's right to a bifurcated trial on the issue of  
6 punitive damages. Eastgate Theater further invokes all standards and/or limitations  
7 regarding the determination and enforceability of punitive damage awards as stated  
8 in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809  
9 (1996) and its progeny, including *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.  
10 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739  
11 (2003).

12 NINTH AFFIRMATIVE DEFENSE

13 Landlord asserts its fourth cause of action for "Injunctive Relief." But injunctive  
14 relief is a remedy, not a separate cause of action. *Luckett v. Mohamed*, 128 Nev. 914, 381  
15 P.3d 636 (2012) (explaining that injunctive relief is a remedy, not a cause of action, and  
16 thus, a cause of action must be asserted against the party before injunctive relief may be  
17 requested against that party); *In re Wal-Mart Wage & Hour Employment Practices Litig.*,  
18 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007) (claim for injunctive relief was "not a separate  
19 cause of action" and "not an independent ground for relief"). Accordingly, Landlord's  
20 injunctive relief claim fails as a matter of law.

21 TENTH AFFIRMATIVE DEFENSE

22 Eastgate Theater acted at all times in accordance with its contractual and legal  
23 rights.

24 ELEVENTH AFFIRMATIVE DEFENSE

25 Eastgate Theater is informed, believes, and thereon alleges that if any contract,  
26 guarantee, obligation, or amendment, including the Lease, as alleged in the compliant on  
27

1 file herein, have been entered into, any duty of performance of Eastgate Theater is excused  
2 by reason of a breach of condition precedent or a prior material breach by Landlord.

3 TWELFTH AFFIRMATIVE DEFENSE

4 Landlord failed to mitigate the damages incurred, if any, and therefore, any  
5 recovery awarded to Landlord against Eastgate Theater should be reduced by that amount  
6 not mitigated.

7 THIRTEENTH AFFIRMATIVE DEFENSE

8 By reason of its acts and/or conduct, Landlord has unclean hands and is not entitled  
9 to some or all of the relief sought through its complaint.

10 FOURTEENTH AFFIRMATIVE DEFENSE

11 At all relevant times to this action, Eastgate Theater has acted in good faith, acted  
12 reasonably, and dealt fairly Landlord, and did not directly or indirectly commit or induce  
13 any act upon which liability to Eastgate Theater can be predicated.

14 FIFTEENTH AFFIRMATIVE DEFENSE

15 Eastgate Theater alleges on information and belief, without admitting the existence  
16 of any duties or obligations as alleged in the complaint, that any duties or obligations,  
17 contractual or otherwise, which Landlord claims are owed by Eastgate Theater to Landlord  
18 have been fully performed, satisfied, or discharged.

19 SIXTEENTH AFFIRMATIVE DEFENSE

20 The complaint, and each purported claim for relief alleged therein, is barred to the  
21 extent that Landlord had knowledge of, acquiesced in, approved of, consented to, and/or  
22 ratified some or all of the acts, conduct, or omissions alleged in the complaint.

23 SEVENTEENTH AFFIRMATIVE DEFENSE

24 Eastgate Theater owed no duty to Landlord for the actions taken by Eastgate  
25 Theater alleged in Landlord' complaint because no special relationship was created  
26 between defendant and plaintiff on the basis of the Lease.

EIGHTEENTH AFFIRMATIVE DEFENSE

All possible affirmative defenses may not have been alleged herein insofar as sufficient information was not available upon reasonable inquiry at the time of filing this answer. Eastgate Theater reserves the right to amend its answer to allege additional affirmative defenses if subsequent investigation warrants.

WHEREFORE, having fully answered Plaintiff Pebble Commercial Center, LLC/Regal I, LLC's complaint, Eastgate Theater asks this Court to:

1. Dismiss Plaintiff Pebble Commercial Center, LLC/Regal I, LLC's action with prejudice;
2. Award Eastgate Theater its costs of suit and reasonable attorney fees; and
3. Award Eastgate Theater such other and further relief as the Court deems just and equitable.

DATED this 9th day of April, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ John E. Bragonje

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(702) 949-8200

*Attorneys for Defendant Eastgate Theatre, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of April, 2021, I caused a true and accurate copy of the foregoing document entitled “Defendant’s Answer” to be filed with the Clerk of the Court via the CM/ECF system, which will send an electronic copy to the following:

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/s/ Luz Horvath

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